

CRIME AND PUNISHMENT

These related events just took place: in Israel the death penalty was extended to terrorists convicted of heinous crimes ... in Florida, a man who killed his companion became the first unwilling American in a dozen years to be executed ... in San Francisco, a man who killed two public officials was convicted of "voluntary manslaughter," which carries a relatively light sentence ... in Sweden it was made unlawful for parents to spank their children.

Jews have always been preoccupied with the subject of punishment. Josephus described the doctrine of free will among early Jews: "When they say that all things happen by fate, they do not take away from men the freedom of acting as they see fit ... virtuously or viciously." If a person can make choices and be "at fault," then that person must be held responsible, and suffer consequences.

This leads to two crucial questions: When is a person "at fault?" What purpose should be served by punishing him?

The Talmud is crammed with efforts to distinguish among degrees of fault. For example, if one man were to deliberately kill another with a stone, he would be subject to the death penalty. If he threw a stone heedlessly onto the public road and killed a person by accident, he would be banished. If he threw a stone at a tree, and someone "put his head forth and was struck by it," the stone-thrower would be free of guilt. In other words, the *wilful* nature of the act is crucial.

But what is "wilful?" English law once said that if a person was so deranged that he didn't know the difference between right and wrong, his will could not be implicated, and therefore he could not suffer the death penalty. Extending that logic, modern courts have been experimenting with the idea that a "diminished capacity" (to exercise the will), should lead to diminished punishment.

But extending that principle too far runs headlong into the other crucial question: what is the purpose of punishment? The basic Jewish position is that punishment serves to establish the moral rules and principles by which we are expected to live. Isaiah said: "When Thy judgements are in the earth, the inhabitants of the world learn righteousness."

The threat of punishment does not do much to directly deter serious crime. Kamikaze terrorists are not deterred; they expect to be killed anyway. And most murders take place among people who know each other and kill in a fit of undeterrable passion.

It is not deterrence, but the instructive establishment of principles which is served by punishment. Israel instituted the death penalty for perpetrators of genocide in order to make an instructive statement about such wilful acts. Parents spank children for the same kind of reason.

Of course, the punishment of a person may be symbolic for society -- but it is less abstract for the person being punished. Since that person is also human, other considerations are raised in meting out punishment, and these also become symbolic for society.

The Talmud deals with this problem by telling the story of the king who had an empty vessel, and two different supplies of water. He said: "If I put the hot water into that vessel it will expand and crack; if I put the icy cold water into that vessel, it will contract and crack." So he mixed the hot with the cold, and the vessel endured. This Talmudic story then ascribes this reasoning to God: "If I create the world only with the attribute of mercy, sins will multiply beyond all bounds; if I create it only with the attribute of justice, how can the world last? Behold, I will create it with both attributes; would that it might endure!"

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"Crime and Punishment"  
page 3

Justice rests on the need for society to establish moral principles of accountability, as qualified by -- but not destroyed by -- the factor of wilfulness and by the general factor of mercy. It is on these difficult scales that each of us must measure what happened in Israel, in Florida, in San Francisco and even in Sweden.

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